Supreme Court, U.S.
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No. 04-191

IN THE

Supreme Court of the United States

COLE SMITH,

Petitioner,

v.

RUSH RETAIL CENTERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Does a purported "need" for a uniform national policy regulating employment arbitration agreements warrant ignoring the plain terms of the Federal Arbitration Act and further warrant overruling *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), both of which permit concurrent jurisdiction in state and federal courts?

2. Should this Court exercise its discretionary jurisdiction to alter well-established law concerning concurrent jurisdiction under the Federal Arbitration Act when there has been no demonstrated need to do so in the last twenty years and when Congress itself has not amended the jurisdictional provisions of the Federal Arbitration Act?

3. Did this Court intend to overrule *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and its extensive progeny *sub silentio* in *Circuit City Stores v. Adams*, 532 U.S. 105 (2002)?

RULE 29.6 STATEMENT

Respondent Rush Retail Centers, Inc., is wholly owned by Rush Enterprises, Inc.

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STATEMENT OF THE CASE

Petitioner, Cole Smith, alleged that Respondent, Rush Retail Centers, Inc., breached an employment agreement by dismissing Smith without cause. R1:2.[1] The employment agreement contained an arbitration provision requiring application of the Federal Arbitration Act (FAA). R1:2. Consequently, the parties arbitrated their employment dispute, and the arbitration panel rendered a binding decision in Respondent's favor. R1:2, 144-52.

Petitioner then filed a complaint in the federal district court, seeking to vacate the arbitration decision. R1:2; *see also* 9 U.S.C. § 10. Petitioner alleged the district court had subject-matter jurisdiction on the basis of Section 10 of the FAA, as well as federal question jurisdiction under 28 U.S.C. § 1331. R1:2. According to Petitioner, the arbitration panel committed misconduct under the FAA and refused to apply Texas law. R1:2-3.

The district court dismissed Petitioner's claim for lack of subject-matter jurisdiction. The United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling with a per curiam opinion. The lower courts held that Petitioner had not established diversity or federal question jurisdiction.

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1. The Fifth Circuit's record is cited by volume and page number.

REASONS FOR DENYING THE PETITION

I. The Underlying Decision Is Correct And Does Not Conflict With Any Prior Law.

In reaching their decisions, the lower courts followed this Court's prior opinions. In no way does the Fifth Circuit's opinion conflict with another circuit court or with any decision by a state court of last resort. The Fifth Circuit faithfully followed the rule of law. Thus, there is no reason for this Court to exercise its jurisdiction. *See* SUP. CT. R. 10(a).

The lower court decisions are based on *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983), where this Court held that the FAA does ***not*** create "any independent federal-question jurisdiction." Before the federal courts have subject-matter jurisdiction over an FAA claim, "there must be diversity of citizenship or some other independent basis for federal jurisdiction." *Id.* The Court reiterated its *Moses H. Cone* holding in *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984).

The Fifth Circuit's decision is consistent with *Moses H. Cone* and *Southland Corp.*, and further consistent with the holdings of the other circuits. *See, e.g., Harry Hoffman Printing, Inc. v. Graphic Communications, Int'l Union, Local 261*, 912 F.2d 608, 611 (2d Cir. 1990); *Garrett v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 882, 884 (9th Cir. 1993); *Ford v. Hamilton Invests., Inc.*, 29 F.3d 255, 257-58 (6th Cir. 1994); *Minor v. Prudential Sec., Inc.*, 94 F.3d 1103, 1104 (7th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997); *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1470-71 (11th

Cir. 1997), *cert. denied*, 525 U.S. 841 (1998); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1246 (D.C. Cir. 1999).

The Eleventh Circuit observed it could "locate ***no*** authority disputing our conclusion that Sections 10 and 11 of the FAA do not confer subject matter jurisdiction on federal courts." *Baltin v. Alaron Trading Corp.*, 128 F.3d at 1471 n.14 (emphasis added). Likewise, Respondents here were unable to find any authority contrary to the Fifth Circuit's decision or any authority critical of the *Moses H. Cone* holding.

Because the FAA does not itself confer subject-matter jurisdiction, Petitioner was required to establish diversity of citizenship or federal-question jurisdiction. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. at 25 n.32. There is no diversity in this case, and Petitioner's complaint did not allege violation of any federal law, other than the FAA.[2]

Yet Petitioner maintains, against the great weight of precedent, that invocation of the FAA ***should*** involve a substantial question of federal law sufficient to confer subject-matter jurisdiction in the federal courts. In making

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2. In FAA cases, there is some dispute among the circuits about the extent to which a federal statute, other than the FAA, should be invoked before it has raised a substantial question of federal law for purposes of conferring federal-question jurisdiction. *Compare Blue Cross of Cal. v. Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1050 n.5 (9th Cir. 1999), *with Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25 (2d Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001). Because ***no*** federal statute was invoked here (other than the FAA), this dispute is irrelevant.

this argument, Petitioner fails to mention *Moses H. Cone* or acknowledge *Southland Corp.*, decisions which are now considered hornbook law. *See, e.g.*, DANIEL P. O'MEARA, ARBITRATION OF EMPLOYMENT DISPUTES 85 (2002).

Instead, Petitioner bases his jurisdictional theory on broad language contained in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2002). That case, however, is inapposite. Subject-matter jurisdiction in *Circuit City* was based on diversity of citizenship. Petition for Writ of Certiorari (Circuit City Stores, Inc.), 2000 WL 34014993, No. 99-1379, *4 (U.S. Feb. 16, 2000). *Circuit City* addresses the FAA's exclusionary language rather than jurisdiction under the FAA. The Court held that FAA coverage does not extend to employment contracts of transportation workers, but does extend to other employment contracts affecting interstate commerce. Neither *Circuit City* (nor any other opinion) supports Petitioner's assertion that arbitration of employment contracts is a federal question for purposes of subject-matter jurisdiction.

II. Petitioner Raises No Compelling Reasons For Granting His Petition.

Review on writ of certiorari is a matter of judicial discretion, rather than of right, and a petitioner must demonstrate compelling reasons for the Court to exercise its jurisdiction. *See* SUP. CT. R. 10. Yet the Petitioner here never claims that either the district court or the Fifth Circuit deviated from the controlling legal standard. In fact, as explained *supra*, the lower courts appropriately followed this Court's holding that state and federal courts have concurrent jurisdiction under the FAA.

Rather than focus on any alleged error in the lower courts or conflict among the circuits, Petitioner claims that it is now time to change well-settled law about the FAA for the sake of a national, uniform policy regulating employment arbitration agreements — which Petitioner erroneously believes can only be accomplished if invocation of the FAA vests the federal courts with federal question jurisdiction. Petitioner, however, did not (and cannot) demonstrate that state courts have undermined the purposes of the FAA when exercising the jurisdiction left to them. Change for the sake of change is not a compelling reason for this Court to exercise its discretionary jurisdiction.

III. There Is No Important Question Of Federal Law That Should Be Settled By This Court.

Since 1983, this Court has required claims under the FAA to have an independent basis for federal jurisdiction when brought in federal district court. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. at 25 n.32. In the last twenty years, cases have been litigated against this backdrop without any ill effect, undermining if not eliminating Petitioner's claimed need for uniformity and national policy.

Petitioner's plea for uniformity is also misplaced; it belongs in the legislative process, not the judicial process. If Congress had wanted a uniform federal approach to the arbitration of employment contracts, it could have amended the FAA long ago to provide exclusive, rather than concurrent, jurisdiction in federal courts. The congressional decision not to do so, and to maintain concurrent jurisdiction under the FAA, is entirely consistent with various other federal employment statutes that provide concurrent jurisdiction in federal and state courts. *See, e.g.*, 29 U.S.C.

§ 28(a)(2) (Fair Labor Standards Act); 29 U.S.C. § 216(b) (Family and Medical Leave Act); 29 U.S.C. § 626(c)(1) (Americans with Disabilities Act); 42 U.S.C. § 20003-5(f)(3) (Title VII of the Civil Rights Act of 1964). Contrary to Petitioner's conclusion, there is nothing inherently special about arbitration of employment disputes that elevates the FAA above any other federal statutory scheme that provides concurrent jurisdiction.

Petitioner's mere desire to make his employment contract a federal question does not make it one, nor does any case or statutory law. Petitioner has not raised any important question of federal law, and this Court should decline to exercise its jurisdiction. *See* SUP. CT. R. 10(c).

CONCLUSION

The decision of the Fifth Circuit is correct, and the Petition should be denied.

Respectfully submitted,

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